

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DANIEL R. HEDRICK,)
)
Plaintiff,)
) CIVIL ACTION
v.)
) No. 06-2129-CM-JTR
)
MICHAEL J. ASTRUE,¹)
Commissioner of Social Security,)
)
Defendant.)
_____)

REPORT AND RECOMMENDATION

Plaintiff seeks review of a final decision of the Commissioner of Social Security (hereinafter Commissioner) denying disability insurance benefits and supplemental security income under sections 216(i), 223, 1602 and 1614(a)(3)(A) of the Social Security Act. 42 U.S.C. §§ 416(i), 423, 1381a, and 1382c(a)(3)(A)(hereinafter the Act). The matter has been referred to this court for a report and recommendation. The court recommends the Commissioner's decision be AFFIRMED.

I. Background

¹On Feb. 12, 2007, Michael J. Astrue was sworn in as Commissioner of Social Security. In accordance with Rule 25(d)(1) of the Federal Rules of Civil Procedure, Mr. Astrue is substituted for Commissioner Jo Anne B. Barnhart as the defendant. Pursuant to the last sentence of 42 U.S.C. § 405(g), no further action is necessary.

After plaintiff's applications for disability insurance benefits and supplemental security income were denied, plaintiff sought, and on Nov. 14, 2004, was given a hearing before an Administrative Law Judge (ALJ). (R. 15, 44, 49-53, 696-738). At the hearing, plaintiff was represented by an attorney and testimony was taken from plaintiff, a medical expert, and a vocational expert. (R. 696, 697). On Dec. 28, 2004, the ALJ issued a decision in which he found that plaintiff is able to perform his past relevant work in retail sales, parts management and as a truck supervisor, and is, therefore, not disabled within the meaning of the Act. (R. 15-19). Consequently, the ALJ denied plaintiff's applications. (R. 18, 19).

In the decision, the ALJ determined that plaintiff has not engaged in substantial gainful activity at any relevant time and has impairments, consisting of alcohol abuse with peripheral neuropathy with altered gait, which are "severe" within the meaning of the Act. (R. 16). He determined that plaintiff's condition does not meet or equal the severity of any impairment in the Listing of Impairments. Id.

The ALJ considered claimant's testimony, the opinions of the medical expert, the medical and hospital records, and the opinions of the medical consultants, and evaluated the credibility of plaintiff's allegations of disabling symptoms and limitations. (R. 16-18). He concluded plaintiff's allegations

are not credible, and assessed plaintiff with a residual functional capacity (RFC) with no limitations in sitting and/or standing, or gripping and/or grasping, walking limited to two thousand feet on a level surface, lifting and carrying a maximum of twenty pounds ten to twelve times an hour, occasional bending and climbing stairs, avoid heights, and no crawling or climbing ladders or scaffolds. (R. 18, 19).

The ALJ next adopted the testimony of the vocational expert and found that plaintiff is able to perform his past relevant work in retail sales, parts management and as a truck supervisor. (R. 18). Therefore, the ALJ found plaintiff not disabled, and denied his applications. (R. 18, 19).

Plaintiff sought and was denied Appeals Council review of the ALJ decision. (R. 11, 7-10). Therefore, the ALJ decision is the final decision of the Commissioner. (R. 7); Threet v. Barnhart, 353 F.3d 1185, 1187 (10th Cir. 2003). Plaintiff now seeks judicial review.

II. Legal Standard

The court's review is guided by the Act. 42 U.S.C. §§ 405(g), 1383(c)(3). Section 405(g) provides, "The findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." The court must determine whether the factual findings are supported by substantial evidence in the record and whether the ALJ applied the correct legal standard.

White v. Barnhart, 287 F.3d 903, 905 (10th Cir. 2001).

Substantial evidence is more than a scintilla, but less than a preponderance, it is such evidence as a reasonable mind might accept to support the conclusion. Gossett v. Bowen, 862 F.2d 802, 804 (10th Cir. 1988). The court may "neither reweigh the evidence nor substitute [it's] judgment for that of the agency." White, 287 F.3d at 905 (quoting Casias v. Sec'y of Health & Human Serv., 933 F.2d 799, 800 (10th Cir. 1991)). The determination of whether substantial evidence supports the Commissioner's decision, however, is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it constitutes mere conclusion. Gossett, 862 F.2d at 804-05; Ray v. Bowen, 865 F.2d 222, 224 (10th Cir. 1989).

An individual is under a disability only if that individual can establish that he has a physical or mental impairment which prevents him from engaging in substantial gainful activity and is expected to result in death or to last for a continuous period of at least twelve months. 42 U.S.C. § 423(d); see also, Barnhart v. Walton, 535 U.S. 212, 217-22 (2002)(both impairment and inability to work must last twelve months). The claimant's impairments must be of such severity that he is not only unable to perform his past relevant work, but cannot, considering his age, education, and work experience, engage in any other

substantial gainful work existing in the national economy. Id.;
20 C.F.R. §§ 404.1520, 416.920 (2004).

The Commissioner has established a five-step sequential process to evaluate whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Allen v. Barnhart, 357 F.3d 1140, 1142 (10th Cir. 2004); Ray, 865 F.2d at 224. "If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary." Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988).

In the first three steps, the Commissioner determines whether claimant has engaged in substantial gainful activity since the alleged onset, whether he has severe impairments, and whether the severity of his impairments meets or equals the Listing of Impairments (20 C.F.R., Pt. 404, Subpt. P, App. 1). Id. at 750-51. If claimant's impairments do not meet or equal the severity of a listed impairment, the Commissioner assesses claimant's RFC. 20 C.F.R. §§ 404.1520, 416.920. This assessment is used at both step four and step five of the process. Id.

After assessing claimant's RFC, the Commissioner evaluates steps four and five, whether the claimant can perform his past relevant work, and whether he is able to perform other work in the economy. Williams, 844 F.2d at 751. In steps one through four the burden is on claimant to prove a disability that prevents performance of past relevant work. Dikeman v. Halter,

245 F.3d 1182, 1184 (10th Cir. 2001); Williams, 844 F.2d at 751 n.2. At step five, the burden shifts to the Commissioner to show other jobs in the economy within plaintiff's capacity. Id.; Haddock v. Apfel, 196 F.3d 1084, 1088 (10th Cir. 1999).

Here, plaintiff claims that the ALJ's credibility finding is not supported by substantial evidence and the ALJ erred in propounding a hypothetical question to the vocational expert which did not relate with precision all of plaintiff's limitations. (Pl. Br., 18-24). Plaintiff argues that the Commissioner's decision should be reversed and the case remanded for an immediate award of benefits. Id., at 24-25. The Commissioner argues that the ALJ's credibility determination is supported by substantial evidence in the record and the hypothetical question propounded to the vocational expert is based upon all of plaintiff's credible limitations, and, therefore, the ALJ's decision should be affirmed. The court agrees with the Commissioner.

III. Credibility Determination

The Tenth Circuit has explained the analysis for considering subjective testimony regarding symptoms. Thompson v. Sullivan, 987 F.2d 1482, 1488 (10th Cir. 1993)(pain, in this case).

A claimant's subjective allegation of pain is not sufficient in itself to establish disability. Gatson v. Bowen, 838 F.2d 442, 447 (10th Cir. 1988). Before the ALJ need even consider any subjective evidence of pain, the claimant must first prove by objective medical evidence the existence of a pain-producing

impairment, Luna v. Bowen, 834 F.2d 161, 163 (10th Cir. 1987) (citing Frey [v. Bowen], 816 F.2d [508,] 515 [(10th Cir. 1987)]; Nieto v. Heckler, 750 F.2d 59 (10th Cir. 1984)), that could reasonably be expected to produce the alleged disabling pain. Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). This court has stated: The framework for the proper analysis of Claimant's evidence of pain is set out in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). We must consider (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling. Musgrave v. Sullivan, 966 F.2d 1371, 1375-76 (10th Cir. 1992) (citing Luna, 834 F.2d at 163-64).

Thompson, 987 F.2d at 1488.

The Commissioner has promulgated regulations suggesting relevant factors to be considered in evaluating credibility: Daily activities; location, duration, frequency, and intensity of symptoms; factors precipitating and aggravating symptoms; type, dosage, effectiveness, and side effects of medications taken to relieve symptoms; treatment for symptoms; measures plaintiff has taken to relieve symptoms; and other factors concerning limitations or restrictions resulting from symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3). The Tenth Circuit in Luna recognized that no list of factors for evaluating credibility can be exhaustive and stated certain additional factors which overlap and expand upon the regulatory factors. Luna, 834 F.2d at 165-66. The Tenth Circuit has developed an oft-repeated a list of factors which includes:

the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Swanson v. Barnhart, 190 Fed. App'x 655, 657 (10th Cir. 2006);
Branum v. Barnhart, 385 F.3d 1268, 1273-74 (10th Cir. 2004);
Adkins v. Barnhart, 80 Fed. App'x 44, 49 (10th Cir. 2003); O'Neal v. Barnhart, 30 Fed App'x 894, 898 (10th Cir. 2002); Arrington v. Apfel, No. 98-7099, 1999 WL 446013 at *9 (10th Cir. Jul. 1, 1999); Lindsey v. Apfel, No. 97-7135, 1998 WL 327884 at *4 (10th Cir. Jun. 22, 1998); Hill v. Chater, No. 96-7046, 1997 WL 3386 at *2 (10th Cir. Jan. 6, 1997); Haller v. Chater, No. 95-5223, 1996 WL 402251 at *1 (10th Cir. Jul. 18, 1996); Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995); Laferry v. Shalala, No. 93-7069, 1994 WL 170793 at *2 (10th Cir. May 5, 1994); Thompson, 987 F.2d at 1489.

In the decision at issue, the ALJ stated the standard he applied in his credibility determination:

In evaluating the testimony, claimant's prior work record and information and observations by treating and examining physicians and third parties relating to such matters as the duration, frequency and intensity of any pain; precipitating and aggravating factors; type, dosage, effectiveness and adverse side-effects of any pain medication; treatment, other than medication, for relief of pain; functional restrictions; and claimant's daily activities should be considered. Also, a claimant's persistent attempts to find relief for his

pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders could combine with physical problems could be relevant to the credibility determination. Luna v. Bowen, 834 F.2d 161 910th [sic] Cir. 1987). Further, Social Security Regulations provide that an individual's subjective complaints shall not alone be conclusive evidence of disability. There must be medical signs and findings, established by medically acceptable diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under the Social Security Act (including statements of the individual and his physician as to the intensity and persistence of such pain or other signs and findings), would lead to a conclusion that the individual is under a disability. (20 CFR 404.1508, 404.1529, 4126.908 and 416.929).

(R. 17).

The ALJ considered and summarized the evidence and gave three reasons for finding plaintiff's allegations of disabling limitations not credible: (1) plaintiff's allegations are not consistent with the record evidence, (2) the alleged severity of plaintiff's symptoms are "totally unsupported by the objective evidence," and (3) "The evidence is clear that claimant continues to abuse alcohol; therefore, claimant's allegations and testimony are inconsistent with the evidence of record." (R. 17).

Plaintiff claims the ALJ's credibility determination is not supported by substantial evidence in the record. Specifically, he claims that "the ALJ never considered that Hedrick's psychological disorders might be combining with his physical

problems to exacerbate his pain level" (Pl. Br., 21); that the record evidence does not support the ALJ's finding that plaintiff's daily activities are inconsistent with disabling impairments (Pl. Br., 21-22); that the medical expert testified that plaintiff "would continue to suffer from peripheral neuropathy and gait disturbance even if he was totally sober" (Pl. Br., 23)(citing (R. 730); and that "the ALJ's reliance on Hedrick's use of methadone is not substantial evidence to support his credibility finding." (Pl. Br., 23). The Commissioner argues that the ALJ properly noted that plaintiff is only mildly limited in activities of daily living, and properly noted that objective evidence and the treatment notes are inconsistent with plaintiff's allegations. (Comm'r Br., 10-11).

Plaintiff's arguments misunderstand the ALJ's decision. Plaintiff's argument that the ALJ failed to consider that plaintiff's psychological disorders might combine with his physical problems ignores the ALJ's statement as quoted above that the "possibility that psychological disorders could combine with physical problems" is one of the factors that is relevant to evaluating the credibility of plaintiff's allegations of disabling symptoms. The ALJ cited the correct legal standard and stated that he had made "a thorough evaluation of the entire record." (R. 15). As the Tenth Circuit has stated, "our general practice, which we see no reason to depart from here, is to take

a lower tribunal at its word when it declares that it has considered a matter." Hackett v. Barnhart, 395 F.3d 1168, 1173 (10th Cir. 2005). The court has found, and plaintiff cites, no evidence in the record which indicates that psychological disorders combine with physical impairments to make plaintiff's symptoms as severe as alleged. This case was decided at the fourth step of the sequential evaluation process, and plaintiff has the burden through step four to present evidence that his condition precludes the performance of his past relevant work. Plaintiff's failure to present evidence that psychological disorders combine with physical impairments in this case preclude a finding that the ALJ erred in failing to specifically discuss such a possibility on the facts of this case. An ALJ need not discuss every piece of evidence. Clifton v. Chater, 79 F.3d 1007, 1009-10 (10th Cir. 1996) (citing Vincent ex rel. Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984)). In making his decision, he must consider all the evidence, and discuss the evidence supporting his decision, the uncontroverted evidence upon which he chooses not to rely, and significantly probative evidence he rejects. Id.

Plaintiff also argues the ALJ made a finding that plaintiff's daily activities are inconsistent with his allegations of disabling impairments, and that this finding is not supported by substantial evidence in the record. (R. 21-22).

When evaluating the severity of plaintiff's impairments at step two and step three of the sequential evaluation process, the ALJ found plaintiff "is mildly restricted in activities of daily living." (R. 16). Plaintiff stated in his "Daily Activities Questionnaire," that he spent fifteen hours a week caring for his mother. (R. 253). He reported he has no problems caring for himself, id., he cooks four times each week, he does his own laundry, and he does housekeeping chores of vacuuming, dusting, dishes, and cleaning the bathroom. (R. 254). He does grocery shopping once a week, drives, and spends ten to fifteen hours a day away from home. (R. 255-56). At the hearing, plaintiff testified that he occasionally dates, and helps with housecleaning, prepares meals, does grocery shopping and the laundry. (R. 706-07, 710). Plaintiff's mother reported that plaintiff cared for her, has no trouble caring for himself, cooked her meals, does light housework, and only occasionally needed to use a walker. (R. 261-63). The finding that plaintiff only has mild limitations in activities of daily living is supported by substantial evidence in the record.

Contrary to plaintiff's argument, the ALJ did not rely upon plaintiff's mild restrictions in daily activities to support the credibility finding. As discussed above, the ALJ found plaintiff's testimony not credible because (1) plaintiff's allegations are not consistent with the record evidence, (2) the

alleged severity of plaintiff's symptoms are "totally unsupported by the objective evidence," and (3) "The evidence is clear that claimant continues to abuse alcohol; therefore, claimant's allegations and testimony are inconsistent with the evidence of record." (R. 17).

As plaintiff argues, the medical expert testified that plaintiff "would continue to suffer from peripheral neuropathy and gait disturbance even if he was totally sober." (Pl. Br., 23)(citing (R. 730)). This fact, however, has no impact on the ALJ's finding regarding credibility. The ALJ specifically found that plaintiff has "peripheral neuropathy with altered gait." (R. 16). He found that plaintiff can walk a maximum of 2000 feet, and that only on a level surface. (R. 18). He did not deny plaintiff has these conditions which are limiting, rather he found that plaintiff's testimony regarding the severity of his limitations is not credible.

Finally, plaintiff argues that "the ALJ's reliance on Hedrick's use of methadone is not substantial evidence to support his credibility finding." (Pl. Br., 23). As plaintiff argues, the ALJ noted that plaintiff "made an extra effort to explain that he was prescribed Methadone for reasons other than substance abuse". (R. 17); c.f. (Pl. Br., 22). However, the ALJ did not find this statement untrue. Moreover, he did not state it as one

of the bases for finding plaintiff's allegations incredible. He merely stated it as a comment in making his decision.

As the Commissioner argues in his brief, "A finding of 'no substantial evidence' will be found only where there is a 'conspicuous absence of credible choices' or 'no contrary medical evidence.'" Trimiar v. Sullivan, 966 F.2d 1326, 1329 (10th Cir. 1992)(quoting Hames v. Heckler, 707 F.2d 162, 164 (5th Cir. 1983) and Hemphill v. Weinberger, 483 F.2d 1137 (5th Cir. 1973)). None of the arguments plaintiff made regarding the credibility determination are supported by the record. Moreover, the bases stated in the ALJ's credibility finding are supported by substantial evidence in the record. As the Commissioner argues, the treating physician noted plaintiff's statements that he works part-time and that "his pain is under control to the point that he is now functional." (R. 400). On several occasions, plaintiff noted that he was working or that his pain was controlled or of decreased severity. (R. 394, 396, 572-73, 575). Finally, as the ALJ found, although plaintiff testified he had only had two to four beers in the last year and frequently reported to medical personnel that he had quit drinking some time before, yet the record shows that he continued to abuse alcohol. (R. 435, 593-92, 596, 602). The court finds no error in the ALJ's credibility determination.

Plaintiff argues that the vocational expert's testimony is not supported by substantial evidence because the ALJ did not include limitations consistent with plaintiff's allegations. The hypothetical presented to a vocational expert must include all limitations found by the ALJ, but need not include all limitations alleged by plaintiff. Barnett v. Apfel, 231 F.3d 687, 690 (10th Cir. 2000). The ALJ need only include limitations which he finds supported by substantial evidence in the record. Davis v. Apfel, 40 F. Supp. 2d 1261, 1269 (D. Kan. 1999). Since the court found no error in the ALJ's credibility determination, the ALJ was correct in not including the limitations alleged by plaintiff in the hypothetical questions propounded to the vocational expert. Consistent with the credibility finding above, the vocational expert testimony upon which the ALJ relied is supported by substantial evidence in the record as a whole.

IT IS THEREFORE RECOMMENDED that the Commissioner's decision be AFFIRMED in accordance with the fourth sentence of 42 U.S.C. § 405(g).

Copies of this recommendation and report shall be delivered to counsel of record for the parties. Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b), and D. Kan. Rule 72.1.4, the parties may serve and file written objections to this recommendation within ten days after being served with a copy. Failure to timely file objections with the court will be deemed a

waiver of appellate review. Hill v. SmithKline Beecham Corp.,
393 F.3d 1111, 1114 (10th Cir. 2004).

Dated this 9th day of April 2007, at Wichita, Kansas.

s/John Thomas Reid
JOHN THOMAS REID
United States Magistrate Judge